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In the
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-378

ST. ELIZABETH'S HOSPITAL OF BOSTON,
PETITIONER,
v.
STEPHEN M. WEINER, INDIVIDUALLY AND AS HE IS CHAIRMAN OF THE RATE SETTING COMMISSION IN THE EXECUTIVE OFFICE OF HUMAN SERVICES IN THE EXECUTIVE DEPARTMENT FOR THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Respondent's Brief in Opposition to Certiorari

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Statement of the Case

The petition seeks reversal of a decision of the First Circuit Court of Appeals upholding the Massachusetts scheme for reimbursing Medicaid providers for their services. The case involving petitioner, St. Elizabeth's Hospital, finds its ultimate

source in a civil action filed by another hospital, the Massachusetts General Hospital (MGH), on July 1, 1975. MGH sought declaratory and injunctive relief from Medicaid rate regulations promulgated by the Massachusetts Rate Setting Commission[1] (the Commission) and approved by the Secretary of Health, Education and Welfare[2] (the Secretary) pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§ 1336-1396i, particularly 42 U.S.C. § 1396a(a)(13)(D). MGH's grounds for attack were that (1) the state regulations violated federal law, 42 U.S.C. § 1396a(a)(13)(D), and regulations promulgated thereunder, 45 C.F.R. § 250.30(a)(2) [recodified as 45 C.F.R. § 450.30(a)(2)], and (2) promulgation of the state regulations violated various constitutional provisions, including Art. I, § 10, cl. 1 (the Impairment of Contracts Clause), and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The state defendants filed a motion to dismiss the action on March 22, 1976, asserting principally that (a) the state regulations were consistent with federal law, as evidenced *inter alia* by the Secretary of HEW's approval of the regulations under a process mandated by Congress in its 1972 Amendments to Title XIX, and (b) the plaintiff's constitutional claims were insubstantial.[3]

On April 15, 1976, St. Elizabeth's Hospital of Boston (St. Elizabeth's) filed a motion to intervene as a party plaintiff. Along with this motion to intervene St. Elizabeth's filed its complaint as an intervening party plaintiff, restating verbatim the claims of MGH in the case-in-chief.

[1] The members of the Rate Setting Commission are the principal state defendants in this action. Additionally, the Governor, the Secretary of the Executive Office of Human Services, and the Commissioner of the Department of Public Welfare were named as defendants.

[2] The Secretary of Health, Education and Welfare, currently Joseph A. Califano, is the sole federal defendant.

[3] The federal defendant filed a motion to dismiss on October 29, 1976.

After a hearing on April 16, 1976, the district court took the question of MGH's dismissal under advisement. Prior to any further court action, MGH submitted a motion for summary judgment on January 3, 1977, as did the state defendants on January 12, 1977. At the court hearing on the cross-motions for summary judgment concerning MGH, held January 24, 1977, the district court allowed St. Elizabeth's motion to intervene. Following this hearing, the district court, on February 4, 1977, granted summary judgment for defendants, finding that (a) there was no genuine issue of material fact, (b) the state regulations were consistent with federal law, and (c) MGH's constitutional claims lacked merit (Pet. App. 1a-5a).

Because St. Elizabeth's motion to intervene was not formally acted upon until late in the proceedings, the district court determined on May 16, 1977, that St. Elizabeth's was not bound by the February 4 order. Subsequently, St. Elizabeth's filed a motion for summary judgment together with its supporting affidavits and exhibits. On June 8, 1977, the state defendants filed a motion for summary judgment as to St. Elizabeth's. On June 23, 1977, the district court entered summary judgment against St. Elizabeth's, finding that "the plaintiff-intervenor's complaint raises no issues other than those already fully briefed, argued and decided by the court's order entered February 4, 1977" (Pet. App. 10a-11a). The court rejected St. Elizabeth's claims on the same grounds as it rejected the claims of MGH.

Both St. Elizabeth's and MGH appealed to the court of appeals. The circuit court affirmed, holding that the Massachusetts Medicaid plan (1) was consistent with Title XIX of the Social Security Act, (2) afforded Medicaid providers with adequate protection under the Due Process Clause and (3) did not violate the Equal Protection Clause or impair the hospitals' contract rights.

Reasons Why Certiorari Should Be Denied

I. CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS, IN UPHOLDING THE VALIDITY OF THE MASSACHUSETTS STATEWIDE MEDICAID PLAN, CORRECTLY INTERPRETED AND APPLIED THIS COURT'S DECISIONS.

A. *Introduction*

This case is an unattractive candidate for Supreme Court review. The petitioner reveals no conflict among the circuit courts on the questions decided by the First Circuit Court of Appeals. The underlying issues have not provoked substantial controversy, and the circuit court in deciding the case did not depart in any manner from this Court's prior decisions. Indeed, St. Elizabeth's in the petition alleges no such departure.

Finally, the underlying record set forth by St. Elizabeth's in this case is a weak one. St. Elizabeth's was not the original plaintiff in this action. Rather, it entered the case near the final stages as an intervenor, and presented no materials or claims substantially different from the original plaintiff, Massachusetts General Hospital (MGH). The record will show that, throughout the trial and appellate proceedings, the petitioner's choice of litigation strategy and substantive arguments simply replicated those of MGH.[4] Focusing, therefore, on St. Elizabeth's part of the litigation, the record is slender and wholly inadequate to permit adequate inquiry into the legality of Massachusetts' Medicaid reimbursement system.

[4] Notably, MGH, after expending the primary efforts in the litigation, chose not to seek certiorari.

B. *The Circuit Court, Acting in Harmony with this Court's Decisions, Deferred to the Judgment of the Secretary of Health, Education and Welfare in Assessing the Reasonableness of the Massachusetts State Plan.*

The Medicaid program authorized under Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.*, reflects a cooperative federal-state effort to render medical assistance to needy families with dependent children as well as to certain aged, blind, or otherwise disabled individuals. In order to participate in Medicaid a state must submit a state plan to the Secretary of Health, Education and Welfare (Secretary) detailing the fulfillment of federal conditions set forth in Title XIX and regulations promulgated thereunder. If the Secretary determines that these conditions are met, he approves the plan, thereby enabling the state to obtain federal reimbursement for expeditures made to medical providers participating in Medicaid, in accordance with the state plan. (See Pet. App. 16a-17a.)

Prior to 1972, the Medicaid Act was read by both the Department of Health, Education and Welfare (HEW) and the federal courts to require states to reimbuse hospital providers the "costs actually incurred" by the provider in serving Medicaid patients (Pet. App. 17a). However, with the enactment of P.L. 92-603, states were no longer limited to this single approach to reimbursing hospitals for their services. Section 232 of P.L. 92-603 modified § 1396a(a)(13)(D) of the Medicaid Act to allow states to reimburse providers the "reasonable cost" of providing hospital services in accordance with "methods and standards . . . developed by the State and reviewed and approved by the Secretary" (Pet. 5). 42 U.S.C. § 1396a(a)(13)(D). The Secretary's regulations which implemented the Congressional Amendments provided that states may adopt the Title XVIII (Medicare) standard for reimbursing hospitals —

i.e., actual cost reimbursement — or may instead propose alternative plans for approval by the Secretary (Pet. App. 17a-18a). In accordance with these changes in law, Massachusetts submitted its prospective reimbursement plan to the Secretary for approval.[5] The Massachusetts plan was approved in December, 1973, by the Secretary, through his designee.

Essentially, petitioner argues that the circuit court erred in not substituting petitioner's concept of "reasonable cost" under 42 U.S.C. § 1396a(a)(13)(D) for that of the Secretary. The court of appeals refused to make this substitution and, consistent with the decisions of this Court, deferred to the judgment of the Secretary on this issue. The court found that the Massachusetts Medicaid plan was approved after careful and sensitive consideration by HEW (see Pet. App. 20a). Medicaid reimbursement is an area of federal activity in which the Congress has "entrust[ed] to the Secretary, . . . the primary responsibility for interpreting the statutory term [reasonable cost]." *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977). In such circumstances the regulations of the Secretary carry with them legislative impact. They may not be set aside simply because a reviewing court might have interpreted the statute in a different manner. *Id.*, n. 9, and cases and authorities cited. Also, when Congress contemplates that an

[5]The state regulations set forth a reimbursement formula, using as a rate base the actual historical costs of a hospital for a particular past year, called a base year. 14 CHSR 3.20 (Pet. App. 101a). An inflation factor is then calculated reflecting the projected inflation rate for health care to be experienced by the class of providers from the end of the base year through the end of the rate year. The inflation factor is applied to all costs which are deemed subject to inflation. The total of these allowable costs, with certain other technical adjustments not material here, constitutes the figure from which a particular hospital's per diem reimbursement rate is calculated. The figure is divided by the number of "allowed inpatient days," 14 CHSR 3.32 (Pet. App. 103a), defined essentially as the actual inpatient days for the base year. The quotient constitutes the hospital's per diem rate of reimbursement.

agency's determination of the meaning of a statutory term will take place through specific administrative decisions, those decisions must be upheld so long as the agency's action is reasonable. 5 U.S.C. § 706(2)(A), (C); *see Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971). Absent any showing of unreasonableness, the court was obligated to act as it did and to give deference to the Secretary's informed judgment. *See, e.g., American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232, 236-237 (1936); *Power Reactor Devel. Co.* v. *International Union of Electrical, Radio & Machine Workers*, 367 U.S. 396, 408 (1961); *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965); *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 371-372 (1973).

In accordance with these cases the circuit court refused to set aside the Secretary's implementation of 42 U.S.C. § 1396a(a)(13)(D).

II. The Court Should Deny Review Because Petitioner has Failed to Exhaust its Administrative Remedies.

St. Elizabeth's advanced the argument in the district court that only actual cost reimbursement was permitted by 42 U.S.C. § 1396a(a)(13)(D). Its claim constituted a facial attack on the Medicaid reimbursement system. Such a claim raises questions of Congressional intent and administrative law, which were confronted and resolved by the courts below. By contrast, the other assertions by St. Elizabeth's (Pet. 11) regarding the inadequacy of the actual rates set by the Commission, as well as the hospital's efficiency of operation and quality of care, relate to the challenged regulations "as applied" in a particular context, raising discrete issues of adjudicative fact. While such issues might be relevant to a claim that the individual reimbursement rate for St. Elizabeth's was unreason-

ably low, and constituted confiscation, that claim was not made in this case. It is now far too late in this litigation for petitioner to veer away from its facial attack. Any claim that the regulations as applied to petitioner are invalid should first be brought within state machinery for administrative review.[6] *See* M.G.L. c. 6A, §§ 32-36 (West). If any hospital believes that it deserves a higher rate under the Medicaid system than it has been given, it should invoke the remedial processes provided by the regulations for that specific purpose. The record contains no indication that St. Elizabeth's ever sought to use available administrative processes before bringing its federal claim.

Thus, because petitioner's "as applied" claim was brought prematurely, it presents an inchoate record, lacking the concreteness essential for review in this Court. Petitioner's request for review should therefore be denied.

[6]If St. Elizabeth's believed that it deserved extraordinary rate treatment outside the boundaries of the prospective rate formula, it could have sought an administrative adjustment under the reimbursement regulations, with both administrative and judicial review available from an adverse determination. 14 CHSR 3.74-3.83 (Pet. App. 116a-122a); M.G.L. c. 6A, § 36; M.G.L. c. 30A, § 14. It is plain that under the state system facts tending to show a confiscatory result from application of the rates would compel rate adjustment.

Conclusion

For the reasons set forth above the Court should deny the petition for certiorari.

Respectfully submitted,

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